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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

HE CLEVELAND ELECTRIC ILLUMINATING COMPANY; THE NORTH AMERICAN COAL CORPORATION; OHIO COAL ASSOCIATION, *Appellants,*

v.

NITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees.*

Appeal from the United States District Court for the Northern District of Ohio

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STATEMENT AS TO JURISDICTION

The Cleveland Electric Illuminating Company, The orth American Coal Corporation and Ohio Coal ssociation, appellants, submit this statement to show at the Supreme Court of the United States has juris- ction of this appeal and that substantial questions e presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, filed December 17, 1956, is reported at 147 F. Supp. 622, and is appended hereto as Appendix A. That Court entered no findings of fact or conclusions of law apart from its opinion.

The report of the Interstate Commerce Commission, which is reported at 298 I.C.C. 85, is appended hereto as Appendix B. The Commission's order is appended hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. Section 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge District Court, dismissing the complaint, was entered on December 27, 1956. Notice of appeal was filed in that court on February 23, 1957. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101 (b). Such jurisdiction is sustained by a large number of cases, including the following: *North Carolina* v. *United States,* 325 U.S. 507 (1945); *Youngstown Sheet & Tube Company* v. *United States,* 295 U.S. 476 (1935); *Ayrshire Collieries Corporation* v. *United States,* 335 U.S. 573 (1949).

STATUTES INVOLVED

Sections 13(3)(4), 15(1) and 15a(2) of the Interstate Commerce Act, as amended (49 U.S.C. sections 13(3)(4), 15(1) and 15a(2)), are set forth in full in Appendix D hereto.

QUESTIONS PRESENTED

The order of the Interstate Commerce Commission here assailed was entered in a proceeding under section 13(3)(4) of the Interstate Commerce Act in which the Commission found that intrastate rates on coal, which had been voluntarily reduced to meet truck competition from origin districts in Ohio to destinations in northeastern Ohio without corresponding reductions from the longer-haul interstate origin districts from whence there was no truck competition, caused undue preference and prejudice as between persons and localities in intrastate commerce on the one hand and in interstate commerce on the other. That ultimate conclusion was premised on the finding that the truck competition from the intrastate origin districts is not of sufficient severity to warrant difference in treatment between the intrastate and the interstate rates in response to such truck competition. The principal questions involved in this appeal are:

I. Whether that finding of the Commission with respect to truck competition is supported by essential findings based on substantial evidence.

II. Whether the Commission, in making that finding with respect to truck competition, could rationally give consideration only to existing and past truck competition and could disregard or treat as legally irrelevant evidence as to imminent large scale diversions to truck service if the intrastate rates were not reduced.

III. Whether, if the previously existing differences between the intrastate and interstate rates must be restored under a finding of preference and prejudice, the Commission has power to order a reduction in the interstate rates, or whether, under section 13(4) of the Interstate Commerce Act, the Commission's

power is limited to ordering an increase in the intrastate rates.

IV. Whether the Commission's findings disclose that the Commission has complied with the rule of this Court in *United States* v. *Illinois Central*, 263 U.S. 515, 524, that a difference in rates cannot be held to be illegal, because unduly preferential and prejudicial, unless it is shown that such difference "is not justified by the cost of the respective services, by their values, or by other transportation conditions."

STATEMENT

In June, 1954, the railroads operating in Ohio, in order to meet truck competition on bituminous coal from nearby mines in Ohio to the Cleveland area,* voluntarily filed, with the Public Utilities Commission of Ohio and the Interstate Commerce Commission, tariffs containing reductions of 44 cents per ton in the rates on bituminous coal from certain origin districts in Ohio, northern West Virginia and western Pennsylvania to the Cleveland area. After the filing of these tariffs the railroads sought special permission from both commissions to postpone the effective date of the tariffs pending further study. This was denied by the Ohio Commission as to the intrastate rates and they became effective as published on August 2, 1954. The Interstate Commerce Commission allowed postponement as to the proposed 44-cent reductions in interstate rates and those reductions never became effective.

After the reduced intrastate rates became effective, the New York, Chicago, and St. Louis Railroad Company, hereinafter called the Nickel Plate Railroad,

* Cleveland, Avon Lake, Willoughby (Eastlake) and intermediate points.

refused to file a new tariff to increase the rates voluntarily, as desired by the other railroads. Thereupon the railroads, other than the Nickel Plate, hereinafter referred to as the railroads, elected to continue in effect their reduced truck-competitive intrastate rates. This had the effect of making the differences between the intrastate and interstate rates 44 cents a ton greater than the differences which were in effect on August 1, 1954.

The railroads then brought the matter to the attention of the Interstate Commerce Commission on allegations that such intrastate rates violated an outstanding order of the Commission.* That Commission thereupon reopened the proceeding in which that order was entered and instituted the section 13 proceeding in which it issued the assailed order. After hearing, it was found that the reduced intrastate rates did not violate the order and that issue is no longer present.

The appellants, who participated in the Commission proceeding in opposition to an order requiring increases in intrastate rates are: The Cleveland Electric Illuminating Company, hereinafter called the Illuminating Company, the North American Coal Corporation and Ohio Coal Association, which are receivers and shippers of coal on the rates involved.

The principal origin districts in Ohio which are involved here are the Middle and Leetonia Districts, which are located in eastern Ohio, nearest to the desti-

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* The order referred to was entered by the Interstate Commerce Commission on May 2, 1933 in Docket No. 25566, *Intrastate Rates on Bituminous Coal Within the State of Ohio,* 192 I.C.C. 413. That order prescribed from and to the points involved in the instant case, and others, certain minimum intrastate rates on bituminous coal. Those minimum rates were much lower in dollars and cents than those here involved.

nation area (an average of 80 miles via highway therefrom) and the Ohio No. 8 district which lies somewhat south of the Middle and Leetonia districts. The districts outside Ohio which ship coal to the Cleveland area which are most significant in this proceeding are the more distant Moundsville and Fairmont districts in northern West Virginia and the Butler-Mercer and Raymilton Districts in western Pennsylvania.

In an effort to effectuate savings in transportation costs, the Illuminating Company began in 1950 to truck substantial tonnages of coal. If the railroads had not made the 44-cent reduction on August 2, 1954, it planned to extend those truck movements to the extent of a million tons in the first year the plan became operative, with increasing amounts of trucking in later years.

The railroads, who had been kept informed of these developments, then took steps to hold this traffic to rail service. In April, 1954, they reduced the interstate rate from Raymilton, Pa., to Ashtabula, a distance of about 80 miles, from $2.67 to $2.36 per ton. That reduction, which is still in effect but not in issue here, held practically all the coal used in the Ashtabula plant (Ceico) to rail service. The next step was publication of the intrastate reductions which are in issue here.

In the hearings before the Commission one of the principal contentions of appellants was that the substantial actual and potential truck competition, which was not present from the interstate origin districts, warranted a difference in treatment of the rates as between those intrastate and interstate districts. Ap-

pellants also showed that the railroads by increasing the intrastate rates to the August 1, 1954, level would suffer a great loss in revenue than by retaining them on the reduced basis.

Various interstate shippers intervened, showing how the trucking from the Ohio districts was also having an adverse effect on their shipments to the Cleveland area. They pointed to the commercial need for an extension of the 44-cent reduction to interstate districts shipping steam coal to the Cleveland area so as to permit them, as well as the intrastate districts, to compete with the intrastate trucking and they urged the Commission to reduce the interstate rates accordingly.

On the question of truck competition and the effect on railroad revenues of increasing the reduced intrastate rates to their former level, the hearing examiner, in his proposed report, which was attached as Exhibit C to the complaint of the Illuminating Company, came to the following conclusion (italics supplied):

> There is keen competition in the sale of steam coal in the Cleveland area between the Ohio districts from which the reduced rates apply and the Fairmont, Moundsville and Butler-Mercer districts. In the last several years most of this coal has been supplied by the Ohio No. 8 and the Fairmont districts. *There is substantial actual and potential truck competition from the Middle and Leetonia districts to the Cleveland area,* but the record clearly indicates the lack of such competition from the Ohio No. 8, Cambridge, and Crooksville districts. The shippers in the Ohio No. 8 district urge, however, that they are as much affected by the truck competition as are the shippers in the Middle-Leetonia districts, but their situation in this respect is not different from

the shippers in the Fairmont, Moundsville and Butler-Mercer districts. *In fact, it appears that the latter shippers are more seriously affected by the truck competition* as their rates generally are higher than the prior rates from the Ohio districts.

The reduced rates from the Ohio districts to the Cleveland area are the result of the voluntary action of the respondents. They were published after lengthy consideration by responsible traffic officials of the carriers, none of whom testified in this reopened proceeding except the traffic vice president of the Nickel Plate. The reduced rates apply only on steam coal and if rate reductions are confined to that type of coal, *there is no sound basis for assuming that they will spread to the extent indicated by the petitioners. The record shows that the reduced rates are compensatory and are not below a minimum reasonable level, and, in the opinion of the examiner, the carriers would suffer a greater loss in revenue by an increase in such rates to the level which existed on August 1, 1954 than by retaining the reductions.* It follows, therefore, that the reduced intrastate rates do not create undue or unreasonable discrimination against interstate commerce.

The examiner recommended that the Commission find (1) that it had not been shown that the intrastate rates caused unjust revenue discrimination against interstate commerce, and (2) that the intrastate rates from origins in the Ohio No. 8, Cambridge and Crooksville districts, but not from the Middle and Leetonia districts, caused undue preference of said origins and shippers and undue prejudice to origins and shippers in the Fairmont, Moundsville and Butler-Mercer districts, which should be removed by re-establishing the differentials and relationships between those districts

which existed on August 1, 1954. Under such a finding, the railroads would have had the alternative of reducing the interstate rates or of increasing the intrastate rates from the Ohio districts, other than the Middle and Leetonia districts.

In its report, the Commission adopted, except for minor and unimportant editorial changes in wording, the summary of evidence relating to truck competition and subsidiary findings in respect thereto contained in the report of the examiner. On the basis of that evidence and those subsidiary findings, the Commission found as follows (App. B, 298 I.C.C. 109)*:

> There is no truck competition from the interstate districts or the Ohio No. 8, Cambridge and Crooksville districts to the Cleveland area. There *is* some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts. (Italics supplied)

The Commission thereupon concluded that the rates in question resulted in undue preference and prejudice as between persons and localities in intrastate and interstate commerce and unjust discrimination against interstate commerce and ordered the railroads to cure such discrimination, preference and prejudice by increasing the intrastate rates to the August 1, 1954, level.

The Commission further held that it had no power under section 13(4) of the Act to restore the differ-

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* The Commission's report in Appendix B is reproduced photographically and the page numbers correspond to those in the official reports of the Commission.

ences in effect on August 1, 1954, by requiring a reduction in the interstate rates rather than by increasing the intrastate rates.

In the case brought by the appellants in the District Court, that court held that the Commission's order was justified by its conclusion that the intrastate rates caused undue preference and prejudice as between persons and localities in intrastate and interstate commerce and that such conclusion was supported by subsidiary findings of fact which were supported by substantial evidence. In view of that finding, the District Court stated that it was not necessary to determine whether the order was also supported by the Commission's conclusion that the intrastate rates caused unjust discrimination against interstate commerce, although the Court noted in that connection that "close and interesting questions" were presented.

The District Court also declined to rule on appellants' contention that the Commission erred in holding that it had no power, under its finding of undue preference and prejudice, to order reductions in the interstate rates.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The problem in this case, as distinct from the usual case arising under section 13(4) of the Interstate Commerce Act, arises from the fact that on the shorter intrastate movements there is actual truck competition which has already resulted in diverting coal traffic from rail movement. Furthermore, there is imminent a substantial increase in the truck competition which will tend to divert even larger tonnages of coal from rail to truck movement unless truck-competitive rates are maintained. The injury to the interstate movement

will be just as great whether or not the intrastate rail rates are increased to the August 1, 1954, level.

In those circumstances the carriers serving the Ohio mines are justified in the exercise of their managerial judgment in protecting themselves against the loss of this traffic. This is particularly true when the interstate carriers can, if they wish, adopt the same protective measures for their interstate traffic. The proper remedy in this situation, if the historical relationships between the intrastate and the interstate rates must be maintained for competitive reasons, is for the interstate rates to be reduced so as to conform to the intrastate truck competitive level rather than for both to be maintained on a level at which substantial rail traffic will be lost to trucks.

In *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809, 816 (S.D. Miss.) aff'd. 349 U.S. 908 (1954), the Court invalidated a Commission order under section 13 on the ground that it disregarded testimony by shippers that they would use trucks rather than pay the increased rail rates, and that the net result would be that the income of the railroads would be reduced rather than increased. Compare *Florida* v. *United States,* 282 U.S. 194, 214-215 (1930).*

In the instant case the Commission's underlying findings show that the problem is similar to that in

* This Court pointed out that the Commission had made no finding as to whether "the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues * * *" and noted that "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." (282 U.S. at 214-215).

the *Mississippi Public Service* case. The ultimate findings and conclusions—that the truck competition on the short hauls is not a differentiating factor justifying the reduced intrastate rates—are without support in the factual findings or the evidence.

In addition, here the Commission found that it lacked the power in this proceeding to reduce the interstate rates to bring about the relation between the intrastate and interstate rates found necessary for competitive reasons. Whether the Commission possesses such authority in cases arising under section 13(4) raises an important and substantial question of law which should be decided by this Court.

These questions are of general importance to the railroads, to shippers, and to the Interstate Commerce Commission in its administration of the Interstate Commerce Act, and should be resolved by this Court.

QUESTION NO. I

The Commission's subsidiary findings furnish no basis for its conclusion that the truck competition here shown by the evidence did not justify the reduced intrastate rates.

The Commission and the courts recognize that a difference in carrier competition encountered is a differentiating circumstance in rate making so as to make lawful, rate relations which might otherwise be declared unlawful as causing preference and prejudice. *East St. Louis Cotton Oil Co.* v. *Baltimore & O. R. Co.*, 243 I.C.C. 43, 46, (1940); *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 14 (1943). Intrastate rates may properly be reduced to meet competitive carrier rates if revenues thereby secured are greater than if

the rates were not reduced and the traffic diverted. *Florida* v. *United States,* 282 U.S. 194, 212, 214-215 (1931); *Virginia Intrastate Coal Rates,* 287 I.C.C. 245 (1952); *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809, affirmed 349 U.S. 908 (1954). This principle requires that the assailed order be set aside unless the Commission's report provides a rational, reasonable basis for finding that truck competition is not a differentiating circumstance in the making of the rates involved.

The Examiner based his conclusion that "there is substantial actual and potential truck competition from the Middle and Leetonia districts", on a recital of evidentiary facts, and subordinate findings relating thereto, all of which were taken over verbatim into the Commission's findings. Furthermore, the Commission neither recited any evidentiary fact nor made any subordinate finding with reference to the facts which it did recite, contrary to those in the proposed report of the Examiner. The Commission's report differs from that of the Examiner on the question of truck competition *only* with respect to the ultimate conclusion of whether the truck competition from the Middle and Leetonia Districts is of such character as to warrant competitive reductions therefrom, with no corresponding reductions from origin districts not subject to truck competition.

In the numbered paragraphs to follow are summarized from the report of the Commission, with references to the pages thereof as found in 298 I.C.C. and reproduced in Appendix B hereto, the Commission's subordinate findings which relate to the matter of truck competition. This is done because appellants believe that the credibility of the witnesses on the

matter of truck competition is important (Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951)) and because the significance of the recited facts is so clear that the only conclusion they could possibly support is that which was drawn by the examiner.

1. Prior to 1950 the Illuminating Company received all of its coal requirements by rail. In that year it commenced using trucks to transport coal from Raymilton, Pa., to its Ceico plant at Ashtabula, a distance of about 82 miles. The truck shipments aggregated 29,951 tons in 1950, 77,769 tons in 1951, 113,912 tons in 1952, and 144,924 tons in 1953. It also received 118,049 tons of coal by truck at its Eastlake plant at Willoughby in 1953, some of which originated in the Leetonia and Middle districts of Ohio. (pp. 87-88) The Illuminating Company received by truck 144,924 tons of coal at Ceico and 118,049 tons at Eastlake in 1953. Trucks were used for transportation of 42,115 tons to Ceico in the first 4 months of 1954 and 63,892 tons to Eastlake in the first 6 months of that year. (p. 96)

2. For some time the Illuminating Company had discussed with railroad officials the question of reductions of rail rates on coal to meet truck competition. Shortly after a meeting in December 1953, a reduction of 31 cents to a rate of $2.36 was proposed from Raymilton to the Ceico plant at Ashtabula. That reduction became effective on April 23, 1954* After the rates were reduced from Raymilton, and while the reduced rates were in effect within Ohio, the truck tonnage diminished considerably. (p. 96)

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* This truck competitive interstate rate is not in issue in the instant case and is still in effect.

3. A survey made by the Nickel Plate showed that in the first eleven months of 1954 the trucks transported 310,445 tons to the Cleveland area involved in the case. The Nickel Plate's principal reason for opposing an increase in the intrastate rates to the August 1, 1954, level was to prevent a further diversion of the traffic to the trucks. (pp. 94-95)

4. If the Ohio rates are increased to their former level and the reduction from Raymilton is removed, the Illuminating Company expects to use trucks for the transportation of about a million tons of coal in the first year. This first year would be regarded as a transitional period, after which the truck tonnage might be expected to increase. (p. 96) It had several studies made with respect to the costs of truck transportation. (p. 97)

5. The Commission found that the truck charges made by the coal companies which supplied the coal could not be accepted as a reliable guide as to the cost of transporting coal by truck. (p. 97) Furthermore, the Commission indicated that little weight could be accorded certain cost studies made by an equipment manufacturer which included no profit item. (pp. 97-98) At page 98 the Commission said:

> One cost study, and perhaps the most significant, was made by a large trucking company of the type which might be employed by the Illuminating Company to haul its coal. It shows costs, including items for management, administration, and profit, of $1.82 a ton for 60 miles, $2.45 for 80 miles*, $2.75 for 100 miles, and $3.12 for 120

* The Commission found that the average distance from the Middle and Leetonia districts to the Cleveland area was 80 miles (p. 102).

> miles, based on loads of 23 tons. The 60-mile hauls contemplate 4 round trips a day, with 2 drivers for each unit. For the hauls of 80, 100, and 120 miles, 3 round trips a day are contemplated for each unit, with either 2 or 3 drivers for the 80-mile haul and 3 for the other hauls. All of the data are based on the use of the trucking equipment 240 days a year, but the statement is made that it could be used at least 300 days a year.

6. In connection with the trucking from Raymilton, the Illuminating Company experienced certain kinds of savings other than in connection with the line-haul rates. These averaged 40 cents a ton. (p. 97)

7. The intrastate reductions were decided upon by the responsible traffic officials of the principal rail carriers in order to forestall the diversion of this traffic to trucks. (p. 88)

8. Even before the 44-cent reduction became effective within Ohio, mines in the Clarksburg area in the Fairmont District of northern West Virginia lost some business in the Cleveland area by reason of intrastate truck transportation. (p. 104) Specific evidence to the same effect given by a company which owns and operates a mine at Cassville, West Virginia. in the Fairmont District is set forth in some detail in the Commission's report. (p. 105) The Commission, in referring to the contentions of the interstate shippers, said (p. 106):

> They point out, and the record shows, that the natural tendency will be for the consumers in the Cleveland area to reduce further their purchases of steam coal from the higher rated interstate districts if the Ohio rates are increased to their former level, thereby creating a more serious source of injury to them than to the Ohio shippers.

This finding of the Commission shows that at the higher rate level, the interstate shippers will not regain the business that will be lost to intrastate truck movements.

9. The Commission's statement with respect to the revenue effect of the 44-cent intrastate reduction, and what the effect would be of restoring the intrastate rates to their former level, reads as follows on page 102:

> In 1953 the Ohio No. 8, Cambridge, Middle, Leetonia, Massillon, and Crooksville districts (the Ohio districts from which the reduced rates apply) shipped by rail 3,423,755 tons of coal to Cleveland, Lorain, Avon Lake, and Willoughby. If the 44-cent reduction had been in effect at that time, the rail revenues would have been reduced by $1,506,452. However, the diversion of 1 million tons of coal from rail to truck would have resulted in a revenue loss of $1,293,548 under the rate of $2.80, and of $1,563,548 under the rate of $3.07. The 44-cent reduction on 3,423,755 tons would have been offset by a diversion of 538,018 tons to trucks based on the rate of $2.80.

This finding of the Commission, stated in other words, says that the revenues which the rail carriers would lose by the diversion of one million tons to truck, would exceed by $1,293,548 (based on the unreduced rate of $2.80 from the Middle district) the reduction in revenues which would follow if the rail carriers retained all the traffic at the reduced rate of $2.36.

These facts clearly show the size of the present truck competition and the potential large loss of traffic to the trucks.

QUESTION NO. II

It is significant that the Commission does not say that there will be no loss of traffic to trucks. But it seeks to minimize the truck competition by the finding: (App. B, 298 I.C.C. 109)

> "There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts."

This finding, however, is in the present tense; it disregards the greatly enlarged imminent diversion to trucks disclosed by the evidence and the other findings. The court below treats this finding as sufficient on the ground that when the Commission said "is" it didn't mean "is" but also "will be in the future", and accordingly holds that the finding also covers potential diversions of traffic. The courts are supposed to take findings as they are, not to reconstruct them, so as to provide findings which the agency did not make. *Colorado-Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626, 634 (1945). The agency must be assumed to have said what it meant to say. Here the examiner referred to the "actual and potential" loss to truck competition. The Commission's elimination of all but the present tense can hardly have been accidental. This is particularly so when the evidence would not have supported any such finding for the future.

Furthermore, this is not a reason for leaving the intrastate rail carrier defenseless against truck competition. If interstate short-haul traffic is also confronted with truck competition, the appropriate remedy is to reduce the interstate rate, as the inter-

state carriers have already done for traffic from the Raymilton area to Ashtabula. If other interstate traffic is indirectly affected, a remedy should be sought which does not deprive the intrastate rail carrier of all means of competing with the trucks.

QUESTION NO. III

The Commission held that it had no power to require a reduction in the interstate rates in order to correct undue preference and prejudice between intrastate and interstate persons and localities. Appellants assert that it does have such power.

The lower court declined to pass directly upon the question. However, it expressed the view that since the Commission found the interstate rates to be reasonable, the remedy of reducing the interstate rates was thereby foreclosed or would not have been exercised in any event. Before proceeding with a consideration of the Commission's power with respect to interstate rates in a section 13 proceeding, we deal with the mistaken view of the lower court as to the controlling effect of the finding that the interstate rates are reasonable. The problem as to this in a section 13 case is no different than if all rates involved were interstate and the issue arose under section 3(1). In such a case, *United States* v. *Illinois Central R. R. Co.*, 263 U.S. 515 (1924), which sustained the order in *Swift Lumber Co.* v. *F. & G. R. R. Co.*, 61 I.C.C. 485, this Court said (p. 524):

> * * * But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.

American Express Co. v. *Caldwell*, 244 U.S. 617, 624.

This question has never been before this Court in a section 13 case. It is, however, of considerable importance in the administration of the Interstate Commerce Act, not only to the parties to this litigation but to the shippers and railroads generally, for this Court to determine whether preference and prejudice as between intrastate and interstate shippers and localities must always be remedied by increasing the intrastate rates or whether the interstate rates may be reduced in order to re-establish what the Commission believes is a rate adjustment free of such preference and prejudice.

When there is an issue as to the lawfulness of the relation between interstate and intrastate rates, both rates are necessarily in issue or else no question of relationship can arise. The requirement that rates be free from preference and prejudice is a relationship requirement. It cannot be made the basis for an increase in the intrastate rates for the purpose of increasing the revenues of the railroads. If the latter is to come about, it must be based on an ultimate finding of revenue discrimination against interstate commerce, a ground which the District Court did not pass upon as support for the order.

The lower court was in error in saying that it was clear from the Commission's opinion that it would have reached the same result without regard for this question. The Commission's finding as to preference and prejudice was independent of its determination as to the relief available. It cannot be assumed that the Commission would not have reduced the interstate

rates if it had not erroneously believed that it lacked authority to do so.

In the *Shreveport* case, *Houston E. & W. T. R. Co. v. United States,* 234 U.S. 342 (1914), which arose prior to the enactment of section 13(4), but where it was alleged that there was undue preference and prejudice as between persons and localities in intrastate and interstate commerce, this Court held that the Commission had the power under section 3(1) of the Interstate Commerce Act to find and order the removal of undue preference of intrastate shippers and localities. The order sustained in that case was in the alternative so that the railroads were permitted to remove the discrimination either by reducing the interstate rates to the level of the competitive intrastate rates or by increasing the intrastate rates to the level of the interstate rates. In that case, at pages 349-350, this Court said:

> "Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. * * *"

It would seem absurd to hold that the issues raised in an investigation instituted under the subsequently enacted section 13(4), and the power of the Commission under that section, are more limited than before that section was enacted. Section 13 was intended to codify, not to narrow, the power exercised by the Commission in the *Shreveport* case.

The very terms of section 13(4) show an intent on the part of Congress to confer on the Commission the power to reduce interstate rates, if that is the appropriate form of relief, whenever there is a finding of undue preference to intrastate shippers and localities and of undue prejudice against interstate shippers and localities. The power conferred is to "prescribe the rate, * * * or the maximum or minimum, or maximum, and minimum, thereafter to be charged, * * * *in such manner as in its judgment* will remove such advantage, preference, prejudice or discrimination." It is obvious that the only alteration possible in an intrastate rate for any one of the purposes stated would be an increase, that is, the prescription of a minimum rate. It follows that the power to prescribe a "maximum" rate to remove such advantage, preference, prejudice or discrimination as may be found by the Commission, is a power necessarily directed to the competitive interstate rate involved in the rate relation under consideration.

The question of the Commission's power to reduce the interstate rates in a section 13 proceeding has a peculiar significance in the instant case. In the course of its report the Commission found that the revenues lost upon the diversion of much less than a million tons of coal per year would exceed the revenues gained by a 44-cent increase in the intrastate rates as applying to the remaining tonnage. This means, in the protection of railroad revenues for the purposes declared in section 15a(2) of the Act, that it was the duty of the Commission to permit the continued maintenance of the truck competitive intrastate level and to meet the commercial needs of the interstate shippers by requiring corresponding reduc-

tions in the interstate rates. That is the only alteration in the rates in issue before the Commission which would preserve historical relationships, satisfy the competitive needs of interstate shippers and, at the same time, satisfy the railroad revenue needs to the maximum extent.

Appellants submit that they are entitled to have the Commission consider this case under a proper interpretation of its power under the Act and that the District Court erred in refusing to consider this contention of appellants.

QUESTION NO. IV

In *United States* v. *Illinois Central*, 263 U.S. 515, 524 (1924) this Court laid down the rule that a

> . . . difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.

In *Ohio* v. *United States*, 292 U.S. 498, 504 (1934) in which this Court sustained the Commission's order in the prior case, such a finding was present in support of the Commission's conclusion that the rates resulted in preference and prejudice. There the Court said (italics supplied):

> * * * From the record it [the Commission] concluded that coal is transported from the Ohio mines to the destinations in question "at intrastate rates *which are generally substantially lower, distance considered,* than are the reasonable interstate rates herein provided, under which such coal is moved to such destinations from Pennsylvania and West Virginia;" and that *"this dis-*

parity in rates is greater than is warranted by differences in transportation conditions from the Ohio mines on the one hand and the Pennsylvania and West Virginia mines on the other."

There is no similar finding here. Without it, there is no legal basis for the Commission's conclusion of preference and prejudice, for unless a given difference in rates is *not justified* by differences in transportation conditions, that difference cannot result in unlawful preference and prejudice.

When, for example, the Commission required the rate from the Ohio No. 8 District to Cleveland to be increased by 44 cents to $3.07 for an average distance of 128 miles when the interstate rate from the Fairmont District is $3.37 for an average distance of 247 miles, it did not rely on transportation standards but it merely required an increase from Ohio No. 8 to restore the previously existing difference in cents.

Reliance on historical relationships is not enough to show compliance with *United States* v. *Illinois Central*, 263 U.S. 515, *supra*. Appellants do not deny that such commercial needs have a place in the making of rates on bituminous coal. But rates cannot be based wholly on commercial needs. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592 (1949). An order so based runs contrary to the rule in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911), in which this Court said: "The law does not attempt to equalize fortune, opportunities, or abilities."

The Illuminating Company introduced evidence to show that, by various transportation standards, the intrastate rates were relatively higher than the inter-

state rates. One such test compared the average revenue received by the railroads at the reduced intrastate rates with the revenue received by the railroads on all interstate movements of coal to and from Ohio. Another test showed that, on traffic of the Illuminating Company moving to the involved destinations from intrastate and interstate origins, the ratio of revenue received by the rail carriers to their out-of-pocket cost was greater for the intrastate traffic than for the interstate traffic. While the District Court rejected the former test as not being relevant to the issues, it made no mention of the latter. Nor did it point to a single finding of the Commission which showed that the difference in rates was justified by transportation conditions.

The Commission recited the evidence referred to but said (App. B, 298 I.C.C. 101):

> * * * It is of course recognized that cost is only one of a number of important elements to be considered in determining the lawfulness of rates, and that rates on coal are not generally made on a mileage basis but are related to one another by group differentials which usually reflect competitive needs more than distance.

Thus, the Commission abandons transportation standards and takes refuge in assumed competitive needs and historical relationships. These furnish no basis for a conclusion of undue preference and prejudice.

CONCLUSION

For the reasons herein set forth, it is submitted that the questions here presented are substantial and of general public importance and that the Court should have the benefit of oral argument and briefs on the merits.

Respectfully submitted,

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